(1) 89-457

No.

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

BILLY McCLURE and EFFIE McCLURE,

Petitioners,

vs.

JEFFERSON ARMS CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS

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66 pp

QUESTION PRESENTED

WHETHER THE DECISION OF THE MISSOURI COURT OF APPEALS EASTERN DISTRICT IN CONSTRUING SECTION 311. 310 R.S.MO. WHICH MAKES IT A MISDEMEANOR TO SELL, VEND, GIVE AWAY OR OTHERWISE SUPPLY INTOXICATING LIQUOR TO A PERSON INTOXICATED OR APPEARING TO BE IN THE STATE OF INTOXICATION AND HOLDING THAT LIQUOR LICENSEES WHO GIVE AWAY LIQUOR RATHER THAN SELL TO INTOXICATED PERSONS WHO THEREAFTER INJURE THIRD PARTIES ARE NOT SUBJECT TO DRAM SHOP LIABILITY UNDER THE STATUTE, WHILE LICENSEES WHO SELL LIQUOR TO SUCH PERSONS ARE LIABLE, CONSTITUTES A DENIAL OF EQUAL PROTECTION TO INNOCENT PERSONS INJURED BY DRUNK DRIVERS WHO ARE GIVEN RATHER THAN SOLD LIQUOR BY LICENSEES, BECAUSE SAID DECISION AND THE CLASSIFICATION ESTABLISHED THEREIN BEARS NO RATIONAL RELATIONSHIP TO THE INTENT OF THE LEGISLATURE WHICH ENACTED SECTION 311.310 R.S.MO.

LIST OF PARTIES

The parties to this proceeding are Petitioners Billy McClure and Effie McClure and Respondent Jefferson Arms Corporation.

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PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS

The Petitioners Billy McClure and Effie McClure respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Missouri Court of Appeals Eastern District entered in the above-entitled proceeding on April 11, 1989.

OPINION BELOW

The opinion of the Missouri Court of

Appeals Eastern District is reported at 770 S.W.2d 406 (Mo. App. 1989) and is reprinted as Appendix A.

JURISDICTION

This is a wrongful death action in which Petitioners Billy McClure and Effie McClure made a claim under Missouri Revised Statute Section 537.080, 1978 for the wrongful death of their son Richard W. McClure as a result of the negligence of the Respondent Jefferson Arms and Defendant Wilbert McIntosh. Suit was filed against Respondent Jefferson Arms a liquor licensee on a dram shop theory based upon a violation of Section 311.310 R.S.Mo. 1978 and against Respondent's employee Wilbert McIntosh for negligent operation of his motor vehicle.

Petitioners received a jury verdict on November 5, 1987 in the Circuit Court of the City of St. Louis, Division Number 7 in the amount of One Million Dollars ($1,000,000.00). After the verdict, within the time provided by law, Respondent Jefferson Arms filed a

post-trial motion for judgment notwithstanding the verdict. Respondent Jefferson Arms' motion was subsequently granted by the trial Court on January 15, 1988 and judgment notwithstanding the verdict was entered in favor of Respondent Jefferson Arms only. Defendant McIntosh filed no post-trial motions and did not participate in the appeal. Petitioners filed their Notice of Appeal to the Missouri Court of Appeals, Eastern District on February 3, 1988 within the time provided by law. On April 11, 1989 the Missouri Court of Appeals, Eastern District ruled that Petitioners did not have a cause of action against Respondent Jefferson Arms under Section 311.310 R.S.Mo. 1978 because Respondent, a liquor licensee, gave the liquor to employee McIntosh rather than selling it to him and was therefore deemed a social host not liable for serving alcohol to the already intoxicated McIntosh who drove his automobile and struck and killed Petitioners' son.

Petitioners timely filed their Motion for Rehearing and/or Transfer to the Supreme Court of Missouri and those motions were denied on May 9, 1989. Thereafter Petitioners timely filed their Application to Transfer with the Supreme Court of Missouri. See Appendix B. Said Application to Transfer was denied by the Missouri Supreme Court on June 13, 1989. See Appendix C. This Petition is therefore timely filed.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION

Constitution of the United States

Amendment 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of life, liberty or property without due process of law nor any person within its jurisdiction the equal protection of the laws.

STATUTE INVOLVED

Section 311.310 R.S.Mo. 1978 - Sale to minor, certain other persons, misdemeanor, exceptions.

Any licensee under this chapter, or his employee, who shall sell, vend, give away or otherwise supply any intoxicating liquor in any quantity whatsoever to any person under the age of twenty-one years, or to any person intoxicated or appearing to be in a state of intoxication, or to a habitual drunkard, and any person whomsoever except his or her parent or guardian who shall procure for, sell, give away or otherwise supply intoxicating liquor to any person under the age of twenty-one years, or to any intoxicated person or any person

appearing to be in a state of intoxication, or to a habitual drunkard, shall be deemed guilty of a misdemeanor; provided, however, that this section shall not apply to the supplying of intoxicating liquor to a person under the age of twenty-one years for medical purposes only, or to the administering of said intoxicating liquor to any person by a duly licensed physician.

STATEMENT OF THE CASE

This wrongful death case was filed against Respondent Jefferson Arms, a liquor licensee on a dram shop theory based upon a violation of Section 311.310 R.S.Mo. 1978 which makes it a misdemeanor for a liquor licensee to "sell, vend, give away or otherwise supply any intoxicating liquor and any quantity whatsoever to ... any person intoxicated or appearing to be in a state of intoxication ... " Suit was also filed against Respondent's employee Wilbert McIntosh for negligent operation of his

motor vehicle. A unanimous verdict for One Million Dollars ($1,000,000.00) was returned for Petitioners Billy McClure and Effie McClure on the dram shop theory against Respondent Jefferson Arms and for vehicular negligence against Respondent's employee McIntosh.

McIntosh did not appeal the judgment. The trial Court granted Respondent a judgment NOV on the grounds that Carver vs. Schafer, 647 S.W.2d 570 (Mo. App. 1983) a case which recognized common law dram shop liability decided on February 8, 1983 could not be given retrospective application to Petitioners' case which arose on October 10, 1982.

On April 11, 1989 the Missouri Court of Appeals Eastern District ruled that the common law after 1981 held that a tavern owner may be liable for serving alcoholic beverages to an intoxicated person or to a minor who subsequently struck and killed another. However, the Appellate Court ruled that Respondent who was licensed to serve liquor by

the drink acted merely as a social host because it gave away rather than sold its liquor to its employee McIntosh who was intoxicated and who then drove his automobile and struck and killed Petitioners' son.

The underlying facts shown at trial were that on October 9, 1982 Richard McClure was struck and killed by an automobile driven by Wilbert McIntosh. McIntosh was employed as a maintenance worker by Respondent Jefferson Arms. Respondent is an apartment complex located in St. Louis, Missouri. On the date of the casualty McIntosh attended a party permitted or sponsored by Respondent for its employees who installed new boilers at the complex. It was a party to celebrate completion of the work.

The party was held at the Respondent Jefferson Arms' complex. The Respondent operates a lounge and is licensed to serve liquor by the drink. An employee of Respondent set up a portable bar for the party using liquor from the Respondent's lounge storeroom.

There was a dispute as to whether Respondent paid for the alcoholic beverages or if the liquor was paid for through money in an employees fund. The Appellate Court ruled that it was undisputed that the Respondent Jefferson Arms did not charge the employees for alcoholic drinks and generated no financial profit from the party.

McIntosh attended the party for several hours. He consumed several beers while at the party. It is unclear the exact number of beers McIntosh consumed but several witnesses testified McIntosh fell asleep on a couch during the party. The party ended sometime between 10:00 and 10:30 p.m. After the party McIntosh and another hotel employee that attended the party, Joy Pennebaker went to a nearby bar and continued drinking. Pennebaker claimed that he and McIntosh drank another two or three beers at the bar. McIntosh and Pennebaker left the bar at approximately 11:45 p.m. Pennebaker, who lived in Illinois, needed

a ride home and McIntosh agreed to take him home. McIntosh was on Interstate-70 driving Pennebaker when his car went off the highway onto a pedestrian walkway and struck and killed Richard McClure.

The Appellate Court found that the common law in Missouri after 1981 held that a tavern owner may be liable for serving alcoholic beverages to an intoxicated person or to a minor who subsequently struck and killed another citing Carver vs. Schafer, 647 S.W.2d 570, 572-75 (Mo. App. 1983); Nesbitt vs. Westport Square, Ltd., 624 S.W.2d 519, 520 (Mo. App. 1981); Sampson vs. W.F. Enterprises, Inc., 611 S.W.2d 333, 335-37 (Mo. App. 1981). The Court further ruled that, however, common law liability for injuries caused by intoxicated drivers was never extended to social hosts. Childress vs. Sams, 736 S.W.2d 48, 49-50 (Mo. banc. 1987); Andres vs. Alpha Kappa Lambda Fraternity, 737 S.W.2d 547, 553 (Mo. banc.

1987) relying on Harriman vs. Smith, 697 S.W.2d 219 (Mo. App. 1985).

The Appellate Court ruled that here Respondent Jefferson Arms did not sell alcoholic drinks to its employees and was at most a social host. The Court found that Respondent Jefferson Arms had no intent to profit from the party; it derived no financial benefit from the party and had no incentive to encourage employees to drink excessively; no commercial motive is evident; even though Respondent Jefferson Arms is licensed to sell alcoholic beverages, it provided free drinks for its employees at the party; the beverages were furnished by a social host not a dram shop keeper.

The Court found that the Respondent Jefferson Arms was at most a social host and the trial Court properly granted judgment notwithstanding the verdict on the theory of dram shop liability. The Appellate Court further held that even though the trial Court

ruled that no common law dram shop liability existed at the time of Richard McClure's death and therefore Respondent Jefferson Arms is not liable for his death, relying on Spotts v. City of Kansas City, 728 S.W.2d 242 (Mo. App. 1987) which held that dram shop liability established in Carver vs. Schafer, 647 S.W.2d 570 (Mo. App. 1983) would not be given retrospective effect; and even though the trial Court did not comment on the holdings in Nesbitt vs. Westport Square Ltd., 624 S.W.2d 519 (Mo. App. 1981) or Sampson vs. W.F. Enterprises, Inc., 611 S.W.2d 333 (Mo. App. 1981) which were decided prior to the date of Richard McClure's death, that irrespective of the holdings in these cases, which dealt with liability of dram shops, Respondent Jefferson Arms did not sell alcoholic beverages to McIntosh for profit. As a social host Respondent Jefferson Arms was not liable for Richard McClure's death. The Appellate Court ruled to affirm the order for judgment notwithstanding the verdict if the ruling was

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proper for any reason even if the groun assigned were wrong. Arthur vs. Jablonow, 6 S.W.2d 364, 365 (Mo. App. 1984).

Despite the Appellate Court's rulin Petitioners point out that it is undispute that Respondent Jefferson Arms was a liquo licensee licensed to serve liquor by the drin in the State of Missouri. It is undispute that Section 311.310 R.S.Mo. 1978 which make it a misdemeanor for a liquor licensee to sell, vend, give away or otherwise supply intoxicating liquor to a person intoxicated or appearing to be in a state of intoxication applied to Respondent on the date Petitioners' cause of action arose. It is undisputed that Respondent at the very least gave away or otherwise supplied intoxicating liquor to its employee McIntosh who was intoxicated or appeared to be in the state of intoxication.

A Motion for Rehearing and Application to Transfer to the Supreme Court of Missouri were filed and denied by the Missouri Court of

Appeals Eastern District on May 9, 1989. Thereafter, Petitioners filed an Application for Transfer to the Supreme Court of Missouri, indicating, inter alia, that the Court of Appeals opinion would allow "all liquor licensees who are covered by the Missouri Liquor Control law Section 311.020 R.S.Mo., et seq. and the Licensing Statute Section 311.090 R.S.Mo. to avoid liability if they gave away or otherwise supply any intoxicating liquor to a minor or any person intoxicated or appearing to be in a state of intoxication", thus depriving Petitioners and those similarly situated from the equal protection of the law as it pertains to Section 311.310 R.S.Mo. Petitioners' Application for Transfer was denied by the Missouri Supreme Court on June 13, 1989 without elaborating the reasons therefore.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE MISSOURI COURT OF APPEALS EASTERN DISTRICT IN CONSTRUING SECTION 311. 310 R.S.MO. WHICH MAKES IT A MISDEMEANOR

TO SELL, VEND, GIVE AWAY OR OTHERWISE SUPPLY INTOXICATING LIQUOR TO A PERSON INTOXICATED OR APPEARING TO BE IN THE STATE OF INTOXICATION AND HOLDING THAT LIQUOR LICENSEES WHO GIVE AWAY LIQUOR RATHER THAN SELL TO INTOXICATED PERSONS WHO THEREAFTER INJURE THIRD PARTIES ARE NOT SUBJECT TO DRAM SHOP LIABILITY UNDER THE STATUTE, WHILE LICENSEES WHO SELL LIQUOR TO SUCH PERSONS ARE LIABLE, CONSTITUTES A DENIAL OF EQUAL PROTECTION TO INNOCENT PERSONS INJURED BY DRUNK DRIVERS WHO ARE GIVEN RATHER THAN SOLD LIQUOR BY LICENSEES, BECAUSE SAID DECISION AND THE CLASSIFICATION ESTABLISHED THEREIN BEARS NO RATIONAL RELATIONSHIP TO THE INTENT OF THE LEGISLATURE WHICH ENACTED SECTION 311.310 R.S.MO.

The Missouri Appellate Court's ruling protects persons injured and their families from violation of Section 311.310 R.S.Mo. when liquor is sold to an intoxicated person who then injures an innocent third person, but the ruling denies protection to innocent third persons and their families from injuries inflicted by the drunk driver if he is given alcohol by the licensed vendor. Put another way, licensed vendors who are covered by Section 311.310 R.S.Mo. and who sell liquor to an intoxicated person are liable if that intoxicated person injures an innocent third

persons served intoxicants in violation thereof.

The ruling of the Missouri Court of Appeals would result in absolving from liability any liquor licensee who gives liquor to one he knows to be a minor or to one who is obviously intoxicated, either of whom thereby becomes further intoxicated on the liquor provided by the licensee and who then drives and kills an innocent third party. The instant decision would allow dram shops to escape liability when they give drinks at ladies nights, birthdays or anniversaries, grand openings or provide complimentary drink tickets for free liquor to employees. Public policy, Section 311.310 R.S.Mo. 1978, the prior holdings as to who is a social host and the Fourteenth Amendment of the United States Constitution all require that liquor licensees be subject to dram shop liability where they sell, vend, give away or otherwise supply to

minors or drunks the liquor that they are licensed to distribute.

Liquor licensees are recognized as "tavern owners and other persons similarly situated," Harriman vs. Smith, 697 S.W.2d 219, 221 (Mo. App. 1985). They are "business vendors of liquor", "licensed vendors", Id. They are "tavern owners who dispense alcoholic beverages by the drink". Lambling vs. Southland, 739 S.W.2d 717, 719 (Mo. banc. 1987).

A dram shop keeper is a person permitted by law being licensed according to the provisions of Chapter 311, R.S.Mo. 1978 to sell intoxicating liquors in any quantity, either at retail or in an original package, not exceeding ten (10) gallons. Andres vs. Alpha Kappa Lambda Fraternity, 730 S.W.2d 547 (Mo. banc. 1987). In contrast, social hosts are defined as a "host who serves alcohol to a guest at his home", Harriman at 221; a college fraternity without a license to serve liquor by the drink; Andres vs. Alpha Kappa Lambda Fraternity, 730

S.W.2d 547 (Mo. banc. 1987); or persons having a party at home where a cover charge is charged to recoup the cost of the party. Childress vs. Sams, 736 S.W.2d 48 (Mo. banc. 1978).

Section 311.310 R.S.Mo. 1978, makes it a misdemeanor for the licensee to "give away" or "otherwise supply" intoxicating liquor. The opinion conflicts with the statute and is a denial of equal protection of the laws.

It is obvious that in the instant case that the Respondent Jefferson Arms was a "business vendor of alcohol", a "licensed vendor" licensed to serve liquor by the drink and to make a profit. Respondent paid a bartender to set up for the party (T. 85 - L. 21, 24). Respondent was licensed to serve liquor by the drink (T. 82 - L. 12, 15). Respondent sold liquor for profit and was expected to make a profit (T. 21 - L. 4, 5; T. 82 - L. 16, 17). The beer and liquor served to McIntosh was supplied through the Respondent

Jefferson Arms lounge on the occasion in question (T. 84 - L. 15-21).

No evidence was presented that the Respondent did not derive a profit from the party. However, the Appellate Court ruled that the Jefferson Arms "generated no financial profit from the party". However, Respondent's liability is not dependent upon whether it derived a financial profit. This liability exists because it is a licensed vendor of liquor by the drink who gives away or otherwise supplies intoxicating liquor to a person intoxicated or appearing to be in a state of intoxication, in violation of Section 311.310 R.S.Mo.

A licensed vendor who pays his bartenders to set up and provide alcoholic beverages and who is expected to make a profit cannot as a matter of law become a social host. The result of the ruling of the Appellate Court would allow any licensed vendor of liquor to <u>give</u> liquor to one recognized to be a minor or an

obviously intoxicated person and who then injures or kills a third party to escape liability because no financial profit was derived from the transaction. Whereas a licensed vendor of liquor who sold liquor to a minor or intoxicated person would be held liable for injuries to innocent third parties which result from the transaction. Thus the Missouri Court of Appeals ruling is a denial of equal protection under the Fourteenth Amendment.

The Missouri Court of Appeals ruling is contrary to the legislative intent of Section 311.310 R.S.Mo 1978 which was to subject all dram shops to liability for selling, vending, giving away or otherwise supplying alcoholic liquor to those persons mentioned in the statute. The legislature clearly did not intend to distinguish between those dram shops which gave away liquor or otherwise supplied liquor and those dram shops which sold liquor.

The Missouri Court of Appeals has created

a classification whereby licensed dram shops are deemed "social hosts" if they give away the liquor they are licensed to serve rather than sell it to intoxicated persons. This class is allowed to escape liability to third persons for personal injuries. This is contrary to the statute itself and is contrary to the intent of the Missouri legislature and thus is a violation of equal protection under the Fourteenth Amendment.

There is no rational basis for treating liquor licensees who give away liquor differently than liquor licensees who sell liquor under Section 311.310 R.S.Mo. There is no rational basis for denying innocent third parties the protection of Section 311.310 R.S.Mo. when liquor is given away by the dram shop and protecting them when liquor is sold by the dram shop. The social host classification made by the Missouri Court of Appeals is violative of the equal protection clause

because it is not rationally related to a legitimate state interest.

The legislature's goal in establishing Section 311.310 R.S.Mo. was to regulate dram shops and to protect innocent third persons from injury by minors and intoxicated persons served in violation of the statute. This goal is not reasonably reached by the classification established by the Missouri Court of Appeals. Thus, many injured persons to whom the legislature intended to grant a cause of action against a seller of liquor will not obtain that right of redress by the means provided in Section 311.310 R.S.Mo. The obvious reason the legislature did not completely do away with liability for sellers of liquor who give liquor away is that it did not want them to have the opportunity to take advantage of immunity by flagrantly and irresponsibly giving liquor to minors and the obviously intoxicated.

The equal protection clause does not deny to states the power to treat different classes

of persons in different ways; it does, however, deny to states the power to legislate that different treatment be accorded to persons placed by statute into different classes when the basis of criteria is wholly unrelated to the object of that statute. Eisenstadt vs. Baird, 405 U.S. 438 (1972). To withstand intermediate scrutiny under equal protection analysis, the statutory classification must be substantially related to important governmental objectives. Clark vs. Jeter, 108 S.Ct. 1910 (1988). The state violates the equal protection clause when it irrationally treats differently those similarly situated or when it irrationally treats similarly those people situated differently. The classification made by the Missouri Court of Appeals is arbitrary, unreasonable and not related to the objects of the legislation of Section 311.310 R.S.Mo.

For the foregoing reasons, the decision of the Missouri Court of Appeals Eastern District violates the equal protection clause of the

Fourteenth Amendment of the United States Constitution. Petitioners respectfully pray therefore, that this Court issue a writ of certiorari to review the decision of the Missouri Court of Appeals Eastern District.

CONCLUSION

For the reasons stated above, this Petition for Writ of Certiorari should be granted. The Missouri Court of Appeals Eastern District denied Petitioners their right to equal protection under the Fourteenth Amendment to the United States Constitution by issuing its decision allowing Respondent to escape liability because it gave away rather than sold intoxicating liquor in violation of Section 311.310 R.S.Mo. to its employee McIntosh.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, THOMAS A. CONNELLY, a member of the Bar of this Court hereby certify that on the 16th day of September, 1989 the appropriate number of copies of the Petition for Writ of Certiorari in the above-entitled case were mailed First Class postage pre-paid to the Clerk of the Supreme Court of the United States and the appropriate number of copies were mailed to Daniel J. Rabbitt, Attorney for Respondent, 705 Olive Street, Suite 1100, St. Louis, MO 63101. I further certify that all parties required to be served have been served.

APPENDIX

Appendix A

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

DIVISION TWO

BILLY McCLURE, et al., Plaintiffs/Appellants,	No. 54391
vs.	Appeal from the Circuit Court of the City of St. Louis
WILBERT McINTOSH, et al., Defendants/Respondents.	Hon. Floyd McBride
	Opinion filed: April 11, 1989
	Motion For Rehearing and Application for Transfer: Denied May 9, 1989
	Application for Transfer to the Supreme Court: Denied May 13, 1989

Plaintiffs, Billy and Effie McClure, appeal from orders in favor of Jefferson Arms Corporation granting directed verdict on Count I which was tried on the theory of agency liability and judgment notwithstanding the verdict on Count II which was submitted on the theory of dram shop liability. Richard McClure, the son of Billy and Effie McClure, was killed when struck by an automobile driven by Wilbert McIntosh, an employee of Jefferson Arms. The McClures filed a wrongful death suit against Jefferson Arms and Wilbert McIntosh. A jury returned a verdict against both defendants for $1,000,000. McIntosh did not appeal the judgment against him. The McClures claim the trial court erred in: (1) granting judgment notwithstanding the verdict; (2) excluding the testimony of William McClure, brother of decedent; and, (3) granting the directed verdict on

the agency theory. We affirm.

On October 9, 1982, Richard McClure was struck and killed by an automobile driven by Wilbert McIntosh. McIntosh was employed as a maintenance worker by Jefferson Arms. Jefferson Arms is an apartment complex located in downtown St. Louis. On the date of the casualty, McIntosh attended a party permitted or sponsored by Jefferson Arms for employees who installed new boilers at the complex. It was a party to celebrate completion of the work.

The party was held in the basement of Jefferson Arms. The complex operates a lounge. An employee of Jefferson Arms set up a portable bar for the party using liquor from the lounge's storeroom. There was a dispute as to whether Jefferson Arms paid for the alcoholic beverages or if the liquor was paid for through money in an employees fund. It

was undisputed, however, that Jefferson Arms did not charge the employees for alcoholic drinks and generated no financial profit from the party.

McIntosh attended the party for several hours. He consumed several beers while at the party. It is unclear the exact number of beers McIntosh consumed, but several witnesses testified McIntosh fell asleep on a couch during the party. The party ended sometime between 10:00 and 10:30 p.m. After the party, McIntosh and another hotel employee who had also attended the party, Joy Pennebaker, went to a nearby bar and continued drinking. Pennebaker claimed he and McIntosh drank another two or three beers at the bar. McIntosh and Pennebaker left the bar at approximately 11:45 p.m. Pennebaker, who lived in Illinois, needed a ride home and McIntosh agreed to take him home. McIntosh was on Interstate 70 driving

Pennebaker home when his car went off the highway onto a pedestrian walkway, struck and killed Richard McClure.

The McClures first claim is there was sufficient evidence to support a claim of dram shop liability against Jefferson Arms and the trial court erred in granting judgment notwithstanding the verdict. The McClures argue that under Section 311.310 RSMo 1978, in effect at the time of Richard McClure's death, Jefferson Arms is liable for serving the alcoholic drinks to McIntosh at the party. The statute provided it was a misdemeanor for a liquor licensee to "sell, vend, give away or otherwise supply any intoxicating liquor in any quantity whatsoever to ... any person intoxicated or appearing to be in a state of intoxication ... ."[1]

[1] Section 311.310 RSMo 1978. The McClures claim Jefferson Arms had a common law

intoxicated person or to a minor who subsequently struck and killed another. See, Carver v. Schafer, 647 S.W.2d 570, 572-75 (Mo. App. 1983); Nesbitt v. Westport Square, Ltd., 624 S.W.2d 519, 520 (Mo. App. 1981); Sampson v. W.F. Enterprises, Inc., 611 S.W.2d 333, 335-37 (Mo. App. 1981). However, liability for injuries caused by intoxicated drivers was never extended to social hosts. See, e.g., Childress v. Sams, 736 S.W.2d 48, 49-50 (Mo. banc 1987); Andres v. Alpha Kappa Lambda Fraternity, 730 S.W.2d 547, 553 (Mo. banc 1987) (relying on Harriman v. Smith, 697 S.W.2d 219 (Mo. App. 1985)).

In both Childress, 736 S.W.2d 48, and Andres, 730 S.W.2d 547, the injuries occurred prior to the enactment of Section 537.053 RSMo 1986. The Supreme Court refused to extend common law liability for injuries cause by

intoxicated persons to social hosts. Here, Jefferson Arms did not sell alcoholic drinks to its employees and was, at most, a social host. Jefferson Arms had no intent to profit from the party. It derived no financial benefit from the party, and had no incentive to encourage employees to drink excessively. Jefferson Arms sponsored a party to reward its employees for completing an extensive and costly maintenance job. No commercial motive is evident. McIntosh attended the party voluntarily and not in the course of his employment duties. Even though Jefferson Arms is licensed to sell alcoholic beverages, it

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(Footnote Continued)
this case. The statute became effective September 28, 1985, and the Supreme Court of Missouri has held the statute may not be applied retroactively. Andres v. Alpha Kappa Lambda Fraternity, 730 S.W.2d 547, 552-53 (Mo. banc 1987).

provided free drinks for its employees at

the party. The beverages were furnished by a social host not a dram shop keeper.

Public policy in Missouri is that it is the consumption and not the furnishing of alcoholic beverages that is the proximate cause of injuries inflicted by intoxicated persons. Section 573.053.1 RSMo 1986. See also, Spotts v. City of Kansas City, 728 S.W.2d 242, 249-50 (Mo. App. 1987). The Supreme Court of Missouri in Andres, 730 S.W.2d at 553, adopted the reasoning of Harriman v. Smith, 697 S.W.2d 219 (Mo. App. 1985), and found that imposing liability upon social hosts would have a substantial impact upon everyday family and social affairs. Andres, 730 S.W.2d at 553. In Childress, 736 S.W.2d at 49-50, the court found that charging a minimal fee for drinks, but not a fee motivated by intent to generate a profit, did not destroy defendant's role as a social host

and therefore did not create liability. Id.

We have found no Missouri cases contemplating liability of an employer for acts of an employee who becomes intoxicated at a company sponsored party. However, several other states which, like Missouri, have no social host liability, have held there is no cause of action against employers for casualties involving employees leaving company sponsored parties. See, e.g., Thompson v. Trickle, 449 N.E.2d 910, 911-12 (Ill. App. Ct. 1983); Kuykendall v. Top Notch Laminates, Inc., 520 A.2d 1115, 1117-18 (Md. Ct. Spec. App. 1987); Whittaker v. Jet-Way, Inc., 394 N.W.2d 111, 113-14 (Mich. Ct. App. 1986); Meany v.Newell, 367 N.W.2d 472, 474-75 (Minn. 1985). See also, Williams v. United States Fidelity and Guaranty Co., 854 F.2d 106, 108-09 (5th

death. We find that irrespective of the holdings in these cases, which dealt with liability of dram shops, Jefferson Arms did not sell alcoholic beverages to McIntosh for profit. As a social host Jefferson Arms was not liable for Richard McClure's death. We affirm an order for judgment notwithstanding the verdict if the ruling was proper for any reason, even if the grounds assigned were wrong. Arthur v. Jablonow, 665 S.W.2d 364, 365 (Mo. App. 1984). Point denied.

The second claim relates to plaintiffs' agency theory. It asserts the trial court erred in excluding the testimony of decedent's brother, William McClure. The McClures offered the testimony of William McClure regarding statements made to him after the fact by Susan Moffit, building manager of Jefferson Arms at the time of the casualty. The court prohibited this

testimony after finding the McClures had not disclosed the witness, thus violating a discovery request for statements made by any agent or employee of Jefferson Arms. The court acted within its discretion in excluding the testimony.

William McClure went to Jefferson Arms after Richard McClure was killed in an attempt to determine what had happened to his brother. He testified that when he went to Jefferson Arms and asked to speak with McIntosh, "[a] lady came out to me and said that he [McIntosh] wasn't available, that she could help me and her name was Mickey [the building manager]." He testified he then asked her if she knew what happened the night his brother died. Counsel for Jefferson Arms objected at this point, stating that Jefferson Arms submitted interrogatories to the McClures requesting any statements

made by any agents or employees of Jefferson Arms about the incident, and that the McClures had denied having any such statements. Counsel for the McClures informed the court that if allowed to testify, William McClure would state the building manager told him: (1) the hotel had a party for its employees; (2) McIntosh got drunk at the party; (3) McIntosh was on duty the evening of the party; and, (4) she asked McIntosh to take Joy Pennebaker, another hotel employee, home from the party. The court found the McClures violated the discovery request and excluded testimony regarding what the building manager may have said to William McClure.

The interrogatory submitted to the McClures read:

> "State whether you or anyone on your behalf obtained a statement from any agent or employee of defendant Jefferson Arms

Corporation concerning said occurrence and, if so:

A. State the name and address of the person who obtained the statement;

B. State whether such statement was oral, written or recorded.

C. If written or recorded, attach a copy of said statement; if oral, state verbatim the contents thereof." (Our emphasis).

The answer given under oath was, "[n]one."

The McClures contend their son, William McClure, was not acting on their behalf when he questioned the building manager and therefore they were not obligated to include Moffitt's statements when answering the interrogatory. We find the scope of the interrogatory included the statements made by Moffitt to William McClure. The McClures did obtain such statement. The interrogatory was directed to identifying a witness, if any, known to plaintiffs with knowledge of such statements. It is

knowledge, not agency, which is operative in the discovery process.

The claim also fails on the agency premise. In Hilmer v. Hezel, 492 S.W.2d 395 (Mo. App. 1973) this court addressed the issue of who may qualify as acting "on behalf of" a party when interrogatories are so phrased. In Hilmer, the pertinent interrogatory asked, "[d]id the defendant or anyone on his behalf obtain a written statement or recording from plaintiff concerning the facts of the occurrence in question?" (Our emphasis). Id. at 396. Although an insurer of the defendant had obtained such a statement, defendant replied, "[n]o" to the interrogatory. Defendant claimed the insurer had not acted on his behalf in obtaining the statement.

The Hilmer court stated that straining to determine who acted on

behalf of the defendant "is an attempt at gamesmanship, contrary to the principle that the purpose of our rules of discovery is to minimize concealment and surprise in litigation." Id. at 396. The court found the defendant's insurer fell within the scope of those "acting on behalf" of defendant and excluded testimony of the insurer since the statements made to the insurer were not answered in the interrogatory.

Here, although William McClure was not a party to the suit, the statements he obtained and conveyed to plaintiffs fell within the scope of the interrogatory. To act on "behalf" of someone is to act for their benefit, support, defense or advantage. BLACK'S LAW DICTIONARY 141 (rev. 5th ed. 1979). William McClure acted for the benefit of his parents. The McClures attempted to use the statements made by Moffitt as

evidence of respondeat superior liability of Jefferson Arms. The purpose of the interrogatory was for Jefferson Arms to find out if the McClures were aware of any statements made regarding Richard McClure's death by employees or agents of Jefferson Arms which supported a claim of respondeat superior liability. The McClures withheld their knowledge of a witness who was prepared to testify about statements of the building manager pertaining to whether McIntosh was on duty and acting within the scope of employment by Jefferson Arms at the time of the casualty. These are essential elements of the case and the statements were beneficial to the McClures in establishing liability of Jefferson Arms. Exclusion of this testimony did not

prelude the McClures from attempting to establish liability through other

evidence.

Whether a party is prejudiced by evasive answers to interrogatories so that exclusion of testimony is proper is a matter left to the discretion of the trial court. Missouri Highway and Transportation Commission v. Pully, 737 S.W.2d 241, 245-46 (Mo. App. 1987); State Highway Commission of Missouri v. Cool's Tall Tower Restaurant and Marina, Inc., 654 S.W.2d 224, 226 (Mo. App. 1983). We cannot say the trial court abused its discretion in excluding the testimony.

The last issue is whether there was sufficient evidence to submit a claim of respondeat superior liability, particularly, whether the trial court erred in granting a directed verdict on this theory. We find there was no evidence to support an agency claim and the court properly granted a directed verdict on the issue.

The McClures only argument in support of the claim of respondeat superior liability is that some states have imposed liability on employers for injuries to third persons caused by an intoxicated employee. No Missouri cases are cited in support of the claim of respondeat superior liability. As discussed earlier, although some states have imposed liability upon employers several other states which, like Missouri, have rejected social host liability, have refused to recognize liability of employers for injuries caused by employees who become intoxicated at employer parties. See, e.g., Thompson v. Trickle, 449 N.E.2d 910, 911-12 (Ill. App. Ct. 1983); Kuykendall v. Top Notch Laminates, Inc., 520 A.2d 1115, 1117-18 (Md Ct. Spec. App. 1987); Whittaker v. Jet-Way, Inc., 394

N.W.2d 111, 113-14 (Mich. Ct. App. 1986); Meany v. Newell, 367 N.W.2d 472, 474-75 (Minn. 1985). See also, Williams v. United States Fidelity and Guaranty Co., 854 F.2d 106, 108-09 (5th Cir. 1988). Because Jefferson Arms acted only as a social host of the party it is not subject to liability.

In addition, the evidence does not support a claim of respondeat superior liability. Susan Moffitt, the building manager, testified McIntosh's job did not require him to be on 24 hour call at Jefferson Arms and he was not on duty the night of the casualty. When asked if she instructed McIntosh to take Pennebaker home from the party, she replied, "[a]bsolutely not." There was no evidence McIntosh was acting within the scope of his employment when he drove Pennebaker home and his car struck Richard McClure. Pennebaker, a witness for Jefferson Arms,

An employer may be found vicariously liable for an employee's tort if the employee commits such act while engaged in an activity falling within the scope of employment. Maryland Casualty Co. v. Huger, 728 S.W.2d 574, 579 (Mo. App. 1987). An act is considered within the scope of employment if it is: (1) something fairly and naturally incident to business, and, (2) done while engaged in the employer's business.

When McIntosh drove Pennebaker to Pennebaker's home in Illinois, he was not acting within the scope of his employment. He was not on duty or engaged in any business for Jefferson Arms. McIntosh was not required to attend the party. He agreed to give a co-worker a ride home after a party and there is nothing in the record, except for the precluded testimony of William McClure, which indicates the building

manager suggested McIntosh drive Pennebaker home. There is no evidence McIntosh acted within the scope of his employment as a maintenance worker when he drove Pennebaker home. Point denied.

We affirm.

Kent E. Karohl, Judge

Stanley A. Grimm, P.J.,
& Gary M. Gaertner, J., concur.

Appendix B

IN THE MISSOURI SUPREME COURT

BILLY McCLURE, et al.,	)	Court of Appeals
	)	No. 54391
Plaintiffs-Appellants,	)	
	)	Appeal from the
vs.	)	Circuit Court of the
	)	City of St. Louis
WILBERT McINTOSH,	)	
	)	Honorable Floyd
Defendant.	)	McBride
	)	Opinion Filed
and	)	April 11, 1989
	)	
JEFFERSON ARMS CORPORATION,	)	Motion for Rehearing
	)	and Application for
	)	Transfer: Denied
Defendant-Respondent.	)	May 9, 1989

PLAINTIFFS'/APPELLANTS' APPLICATION FOR TRANSFER OF CAUSE FROM THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT TO THE SUPREME COURT OF MISSOURI

COME NOW Plaintiffs/Appellants pursuant to Rule 83.03 and move this Honorable Court for an Order transferring this cause to the Supreme Court of Missouri following the opinion by the Missouri Court of Appeals, Eastern District, filed on April 11, 1989 and as grounds therefore state to the Court as follows:

INTRODUCTION

This wrongful death case was filed against

Respondent, a liquor licensee on a dram shop theory based upon a violation of Section 311.310 R.S.Mo. 1978 and upon an agency theory. Verdict was directed for Respondent on the agency theory. A unanimous verdict for One Million Dollars ($1,000,000.00) was returned for Appellants on the dram shop theory. The trial Court granted Respondent a judgment NOV on the grounds that Carver v. Schafer, 647 S.W.2d 570 (Mo. App. 1983), a case which recognized common law dram shop liability decided on February 8, 1983 could not be given retrospective application to Appellants' case which arose on October 10, 1982.

On April 11, 1989 the Missouri Court of Appeals, Eastern District ruled that the common law after 1981 held that a tavern owner may be liable for serving alcoholic beverages to an intoxicated person or to a minor who subsequently struck and killed another. Section 311.310 R.S.Mo. 1978 made it a misdemeanor to sell, vend, give away or otherwise supply any intoxicating liquor to any

person intoxicated or appearing to be in a state of intoxication.

However, the Appellate Court ruled that Respondent, which was licensed to serve liquor by the drink, acted merely as a social host because it gave away rather than sold its liquor to its employee Defendant McIntosh who was intoxicated and who then drove his automobile and struck and killed Appellants' son.

The Appellate Court further excluded Respondent's manager's statement to William McClure, Appellants' adult son, that McIntosh was on duty at the time of the accident, establishing respondeat superior liability, on the ground that it was within the scope of an interrogatory to Appellants seeking statements obtained from Respondent's employees by "you or anyone on your behalf".

Following the opinion of the Court of Appeals, Appellants filed their Motion for Rehearing and Application to Transfer to the

Supreme Court and these were denied on May 9, 1989.

1. THE OPINION OF THE COURT OF APPEALS THAT RESPONDENT, A LIQUOR LICENSEE WAS ACTING AS A SOCIAL HOST IS CONTRARY TO THE THEN-EXISTING LAW, SECTION 311.310 R.S.MO. 1978.

Section 311 R.S.Mo. 1978 which was the basis for Appellants' dram shop cause of action provided it was a misdemeanor for a liquor licensee to "sell, vend, give away or otherwise supply any intoxicating liquor in any quantity whatsoever ... to any person intoxicated or appearing to be in a state of intoxication ...".

The opinion that Respondent, a liquor licensee, was "a social host" because it gave away its liquor to Defendant McIntosh and was thereby exempt from dram shop liability is contrary to Section 311.310 R.S.Mo. 1978.

2. THE OPINION OF THE COURT OF APPEALS THAT A LIQUOR LICENSEE CAN ACT AS A SOCIAL HOST

IS CONTRARY TO A PREVIOUS OPINION OF AN APPELLATE COURT.

The opinion that Respondent was acting as a social host is in direct conflict with three previous opinions interpreting who is a social host for dram shop liability. Specifically, this opinion conflicts with Harriman v. Smith, 697 S.W.2d 219 (Mo. App. 1985) which ruled that an unlicensed host who serves alcohol to guests in his home is a social host.

This opinion conflicts with Andres v. Alpha Kappa Lambda Fraternity, 737 S.W.2d 547 (Mo. banc 1987) which ruled that a college fraternity without a license to serve liquor by the drink is a social host.

This opinion conflicts with Childress v. Sams, 736 S.W.2d 48 (Mo. banc 1987) which ruled that persons having a party at home who are unlicensed to serve liquor by the drink but who charge a cover charge to recoup the cost of the party, are social hosts.

3. THE QUESTION OF WHETHER A LIQUOR LICENSEE CAN BE A SOCIAL HOST EXEMPT FROM DRAM

SHOP LIABILITY IF HE GIVES AWAY RATHER THAN SELLS THE LIQUOR HE IS LICENSED TO SERVE IS A QUESTION OF SUCH GENERAL INTEREST AND IMPORTANCE THAT IT SHOULD BE RESOLVED BY THE MISSOURI SUPREME COURT.

All cases falling within the protection of Section 311.310 and the holdings of Carver v. Schafer, 647 S.W.2d 570 (Mo. App. 1983); Nesbitt v. Westport Square Ltd., 624 S.W.2d 519 (Mo. App. 1981); and Sampson v. W.F. Enterprises, Inc., 611 S.W.2d 333 (Mo. App. 1981) are severely affected by the instant opinion because heretofore no licensed dram shop could escape liability by merely giving away rather than selling the liquor it was licensed to serve.

This ruling allows all liquor licensees who are covered by the Missouri Liquor Control Law §311.020, et seq. and the Licensing Statute, §311.090 R.S.Mo. to avoid liability if they give away or otherwise supply any intoxicating liquor to a minor or any person intoxicated or appearing to be in a state of

intoxication. This would result in absolving from liability any liquor licensee who gives liquor in his bar to one he knows to be a minor or to one who is obviously intoxicated, either of whom thereby becomes further intoxicated on the liquor provided by the licensee, and who then drives and kills an innocent third party. The instant decision would allow dram shops to escape liability when they give drinks at ladies nights, birthdays or anniversaries, grand openings, or provide complimentary drink tickets or free liquor to employees.

Public policy, §311.310 R.S.Mo. 1978 and the prior holdings as to who is a social host all require that liquor licensees be subject to dram shop liability whether they sell, give away or otherwise supply to minors or drunks the liquor they are licensed to distribute.

4. THE OPINION OF THE COURT OF APPEALS THAT RESPONDENT'S MANAGER'S STATEMENT TO WILLIAM MCCLURE, A NON-PARTY, CONSTITUTES A STATEMENT TAKEN BY "YOU [PLAINTIFFS] OR ANYONE

ON YOUR BEHALF" IS CONTRARY TO A PREVIOUS APPELLATE DECISION.

The opinion is contrary to Hilmer v. Hezel, 492 S.W.2d 395 (Mo. App. 1973) which ruled that "on (your) behalf" means an agent such as in insurer. Furthermore the opinion is contrary to Dinger v. Burnham, 288 S.W.2d 696 (Mo. App. 1950) which held that agency between parent and child cannot be inferred from mere relationship or family ties unattended by condition, acts or conduct clearly implying an agency. The sanction of exclusion of the statement was an abuse of discretion because it denied Appellants from establishing respondeat superior liability.

5. THE QUESTION OF WHO IS INCLUDED WITHIN THE SCOPE OF AN INTERROGATORY INQUIRING "STATE WHETHER YOU OR ANYONE ON YOUR BEHALF OBTAINED A STATEMENT FROM ANY AGENT OR EMPLOYEE OF DEFENDANT [JEFFERSON ARMS CORPORATION] CONCERNING SAID OCCURRENCE" IS OF SUCH GENERAL INTEREST OR IMPORTANCE THAT THE FINAL DECISION SHOULD BE MADE BY THE SUPREME COURT.

This issue should be decided by the Supreme Court for the following reasons (a) The interrogatory in question is commonly used to determine whether an adverse party has obtained a statement from the inquiring party or its employees; (b) The Appellate Court opinion would extend the scope of inquiry to statements obtained by non-parties who were not asked by the parties to obtain statements; (c) The opinion would result in a strained interpretation of the interrogatory requiring the disclosure of statements or conversations obtained by non-party witnesses which were gathered without the request of a particular party; (d) The opinion would require a party to inquire of non-party witnesses whether an adverse party made a statement to such witnesses and to disclose such statements in interrogatories or suffer exclusion thereof;

6. <u>THE OPINION IS IN CONFLICT WITH MRCP RULE 56.01(B)(3) TRIAL PREPARATION: MATERIALS.</u>

Rule 56.01(b)(3) allows discovery of statements and other materials prepared by or

for another party or for that particular party's representative including his attorney, consultant, surety, indemnitor, insurer or agent, but the rule does not require production of evidence obtained by non-party witnesses.

WHEREFORE, Plaintiffs/Appellants move this Court to transfer this cause to the Supreme Court and to allow rebriefing and for such further orders as may be just and proper.

MARTIN, BAHN, MALEC AND CERVANTES

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Attorneys for Plaintiffs/
Appellants

PROOF SERVICE

A copy of the foregoing was delivered this _____ day of May, 1989, to opposing counsel of record, Mr. Daniel T. Rabbitt, Attorney at Law, 705 Olive, 12th Floor, St. Louis, Missouri 63101; and to the Clerk of the Missouri Court of Appeals, Eastern District, Wainwright Building, St. Louis, Missouri 63101.

Appendix C

No. 71707

ED 54391

IN THE SUPREME COURT OF MISSOURI

May Session 1989

Billy McClure, et al.,	)	Plaintiffs-Appellants,
vs. TRANSFER	)	
Wilbert McIntosh, et al.,	)	Defendants-Respondents.

Now at this day, on consideration of Plaintiffs-Appellants' Application to transfer the above entitled cause from the Eastern District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI-SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri,

certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session thereof, 1989, and on the 13th day of June 1989, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 13th day of June, 1989.

Thomas F. Simon, Clerk

APPENDIX D

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

TO: ATTORNEY OF RECORD

FROM: DEIRDRE O. AHR. CLERK

DATE: SEPTEMBER 14, 1989

RE: MOTION FOR REHEARING AND/OR TRANSFER TO SUPREME COURT DENIED

54391 MCCLURE, BILLY & EFFIE, ETC., APP.
vs. MCINTOSH, WILBERT & JEFFERSON ARMS CORP., RESP.

Supreme Court, U.S.
FILED
OCT 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 89-457

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BILLY MCCLURE and EFFIE MCCLURE,
Petitioners,

vs.

JEFFERSON ARMS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the
Missouri Court of Appeals, Eastern District

BRIEF OF RESPONDENT JEFFERSON ARMS CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DANIEL T. RABBITT
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Appendix A

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[1] The opinion is repeated in respondent's Appendix A because the opinion of the Eastern District of the Missouri Court of Appeals is only partially reproduced in petitioners' Appendix.

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No. 89-457

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BILLY McCLURE and EFFIE McCLURE,
Petitioners,

vs.

JEFFERSON ARMS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the
Missouri Court of Appeals, Eastern District

BRIEF OF RESPONDENT JEFFERSON ARMS CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

REASONS FOR DENYING THE PETITION

This case presents no basis to authorize review of the decision of the Eastern District of the Missouri Court of Appeals by Writ of Certiorari. In violation of Supreme Court Rule 21.1(h), petitioners have failed to specify in their Petition at what stage of the state court proceedings a federal question involving the equal protection clause of the Fourteenth Amendment of the United States Constitution was raised. Indeed, petitioners could not because none was raised. In effect, petitioners now attempt to raise a federal constitutional issue for the first time in this Court. This they may not do.

Furthermore, even if petitioners properly raised and preserved a federal constitutional issue in the courts below, no ground for issuance of a Writ of Certiorari exists. Petitioners advance the mistaken proposition that the decision of the Eastern District of the Missouri Court of Appeals involved the interpretation of the Section 311.310, R.S.Mo. 1978. Rather, the court's decision involved the application of common-law principles prohibiting the imposition of dram shop liability on a social host. Resp. App. A-4 to 5. Last, petitioners' position is additionally undermined by the fact that they did not submit their cause of action to the jury on a theory premised on a violation of Section 311.310, R.S.Mo. 1978. Resp. App. B-1.

For these reasons, respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari.

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS HAVE FAILED TO SPECIFY THE PARTICULARS, IF ANY, CONCERNING EARLIER PROCEEDINGS ON A FEDERAL QUESTION INVOLVING THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

In this case, petitioners seek a Writ of Certiorari from this Court to review the decision of the Eastern District of the Missouri Court of Appeals on the ground that the decision violates the equal protection clause of the Fourteenth Amendment of the United States Constitution. Their Petition for Writ of Certiorari, however, should be denied because petitioners have failed to specify the particulars, if any, concerning earlier proceedings on a federal constitutional question.

Supreme Court Rule 21 governs the contents of a Petition for Writ of Certiorari. Where the Petition invites review of the judgment of a state court, Supreme Court Rule 21.1(h) requires that:

> [T]he statement of the case shall also specify the stage of the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way they were passed upon by the court.

Rule 21 further provides that the failure of a petitioner to present in a Petition whatever is essential to a ready and adequate understanding of the points under consideration is a sufficient reason for denying the Petition. Sup.Ct.R. 21.5.

In the present case, petitioners have wholly failed to comply with the mandate of Rule 21. Their Petition for Writ of Certiorari fails to specify at what stage of the proceedings before the courts of the State of Missouri, if any, that a federal constitutional question was raised or passed upon. Indeed, petitioners have not only failed to specify the particulars of their alleged federal constitutional question, but they have also failed to state whether a federal constitutional question was ever raised at all in the courts below. Consequently, since petitioners failed to specify the particulars, if any, concerning earlier proceedings on a federal question involving the equal protection clause of the Fourteenth Amendment of the United States Constitution, their Petition for Writ of Certiorari should be denied.

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS CAN NOT RAISE FOR THE FIRST TIME ON A WRIT OF CERTIORARI A FEDERAL CONSTITUTIONAL CHALLENGE WHICH WAS NEVER RAISED, PRESERVED, OR PASSED UPON IN THE STATE COURTS BELOW.

Petitioners argue that a Writ of Certiorari should be issued in the present case because the decision of the Eastern District of the Missouri Court of Appeals purportedly violates the equal protection clause of the Fourteenth Amendment of the United States Constitution. As demonstrated in point one, petitioners

have failed to specify whether a federal constitutional question was ever raised at all in the courts of the State of Missouri. A review of petitioners' appendices shows that no constitutional issues were ever presented. Indeed, the opinion of the Eastern District of the Missouri Court of Appeals, the petitioners' Application for Transfer of Cause from the Missouri Court of Appeals, Eastern District, to the Supreme Court of Missouri, and the ruling of the Supreme Court of Missouri therein are all silent on the question of a federal constitutional challenge premised on the equal protection clause of the Fourteenth Amendment. Absent presentation of such an issue in the courts of Missouri, petitioners cannot raise for the first time on a Writ of Certiorari a federal constitutional challenge which was never raised, preserved, or passed upon in the state courts below.

Justice White for the Court stated the rule as follows:

> . . . [T]he fact emerged in oral argument that the sole federal question argued here had never been raised, preserved, or passed upon in the state courts below. It was very early established that the Court will not decide federal constitutional issues raised here for the first time on the review of state court decisions. In *Crowell v. Randell,* 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with *Owings v. Norwood's Lessee,* 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789 [citation omitted] vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. "If both of these do not appear on the record, the appellate jurisdiction fails." 10 Pet. 368, 391. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the *Crowell* opinion . . . and since. . . .

Cardinale v. Louisiana, 394 U.S. 437, 438 (1969).

Consequently, since the record demonstrates that no federal constitutional question was raised, preserved, or passed upon in the state courts below, none may be raised in this Court. Thus, the instant Petition for Writ of Certiorari should be denied.

III. NOTWITHSTANDING PETITIONERS' FAILURE TO RAISE THEIR FEDERAL CONSTITUTIONAL QUESTION IN THE STATE COURTS BELOW, THE DECISION OF THE EASTERN DISTRICT OF THE MISSOURI COURT OF APPEALS DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY HOLDING THAT A LIQUOR LICENSEE WHO ACTS IN THE CAPACITY OF A SOCIAL HOST IS NOT SUBJECT TO DRAM SHOP LIABILITY.

A. Petitioners Did Not Submit Their Cause Of Action To The Jury On A Theory Premised On A Violation Of Section 311.310, R.S.Mo. 1978.

Petitioners seek to invoke this Court's review of the decision of the Eastern District of the Missouri Court of Appeals on the ground that the decision violates the equal protection clause of the Fourteenth Amendment to the United States Constitution. Their argument focuses on Section 311.310, R.S.Mo. 1978, which petitioners contend created a cause of action in their favor against respondent. However, petitioners did not submit their case to the jury under such a theory. Rather, as evident from their verdict directing instruction, petitioners submitted their case under general principles of common-law negligence as provided in *Carver v. Schafer,* 647 S.W.2d 570 (Mo.App. 1983). Resp.App. B-1.

B. The Decision Of The Eastern District Of The Missouri Court of Appeals Did Not Rest On A Construction Of Section 311.310, R.S.Mo. 1978, But On Common-Law Principles Prohibiting The Imposition Of Dram Shop Liability On A Social Host.

In their Petition for Writ of Certiorari, petitioners attempt to invent a "constitutional" question for review by focusing on Section 311.310, R.S.Mo. 1978. However, the decision of the Eastern District did not involve the statutory construction of Section 311.310, R.S.Mo. 1978. Rather, the Eastern District's opinion relied on common-law principles stated by Missouri courts which provide that liability for injuries caused by intoxicated drivers does not extend to social hosts. Resp.App. A-4-5. Under the facts of this case, the Eastern District held respondent to be a social host and, therefore, not subject to dram shop liability. Resp.App. A-5.

C. The Issues Before The Eastern District Of The Missouri Court Of Appeals Are Unique And Not Likely To Arise Again.

Petitioners' wrongful death action, which was predicated on an action for dram shop liability, arose on October 9, 1982, the date of death of petitioners' decedent. Resp.App. A-2. Since that time, the Missouri General Assembly has enacted a new dram shop liability statute which prohibits dram shop liability in Missouri absent proof that the dram shop keeper has been convicted or received a suspended imposition of sentence pursuant to Section 311.310, R.S.Mo. 1986. Section 537.053.3, R.S.Mo. 1986. Resp.App. C-1. The new dram shop statute also abrogated the decisions in *Sampson v. W.F. Enterprises, Inc.*, 611 S.W.2d 333 (Mo.App. 1980), *Nesbitt v. Westport Square, Ltd.*, 624 S.W.2d 519 (Mo.App. 1981), and *Carver v. Schafer*, 647 S.W.2d 570 (Mo.App. 1983), all cases relied upon by petitioners before this Court. Section 537.053.2, R.S.Mo. 1986. Consequently, the state of the law with respect to dram shop liability

in Missouri has been completely changed since the time petitioners' cause of action arose and the issues presented by their Petition for Writ of Certiorari are unlikely to arise again.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION TWO

No. 54391

BILLY McCLURE, et al.,
Plaintiffs/Appellants,

vs.

WILBERT McINTOSH, et al.,
Defendants/Respondents.

Appeal from the Circuit Court
of the City of St. Louis

Hon. Floyd McBride

OPINION

(Filed: April 11, 1989)

Plaintiffs, Billy and Effie McClure, appeal from orders in favor of Jefferson Arms Corporation granting directed verdict on Count I which was tried on the theory of agency liability and judgment notwithstanding the verdict on Count II which was submitted on the theory of dram shop liability. Richard McClure, the son of Billy and Effie McClure, was killed when struck by an automobile driven by Wilbert McIntosh, an employee of Jefferson Arms. The McClures filed a wrongful death suit against Jefferson Arms and Wilbert McIntosh. A jury returned a verdict against both defendants for $1,000,000. McIntosh did not appeal the judgment against him. The McClures claim the trial court erred in: (1) granting judgment notwithstanding the verdict; (2) excluding the testimony of William McClure, brother of decedent; and, (3) granting the directed verdict on the agency theory. We affirm.

On October 9, 1982, Richard McClure was struck and killed by an automobile driven by Wilbert McIntosh. McIntosh was employed as a maintenance worker by Jefferson Arms. Jefferson Arms is an apartment complex located in downtown St. Louis. On the date of the casualty, McIntosh attended a party permitted or sponsored by Jefferson Arms for employees who installed new boilers at the complex. It was a party to celebrate completion of the work.

The party was held in the basement of Jefferson Arms. The complex operates a lounge. An employee of Jefferson Arms set up a portable bar for the party using liquor from the lounge's storeroom. There was a dispute as to whether Jefferson Arms paid for the alcoholic beverages or if the liquor was paid for through money in an employees' fund. It was undisputed, however, that Jefferson Arms did not charge the employees for alcoholic drinks and generated no financial profit from the party.

McIntosh attended the party for several hours. He consumed several beers while at the party. It is unclear the exact number of beers McIntosh consumed, but several witnesses testified McIntosh fell asleep on a couch during the party. The party ended sometime between 10:00 and 10:30 p.m. After the party, McIntosh and another hotel employee who had also attended the party, Joy Pennebaker, went to a nearby bar and continued drinking. Pennebaker claimed he and McIntosh drank another two or three beers at the bar. McIntosh and Pennebaker left the bar at approximately 11:45 p.m. Pennebaker, who lived in Illinois, needed a ride home and McIntosh agreed to take him home. McIntosh was on Interstate 70 driving Pennebaker home when his car went off the highway onto a pedestrian walkway, struck and killed Richard McClure.

The McClures first claim is there was sufficient evidence to support a claim of dram shop liability against Jefferson Arms and the trial court erred in granting judgment notwithstanding the verdict. The McClures argue that under §311.310 RSMo 1978, in effect at the time of Richard McClure's death, Jeffer-

son Arms is liable for serving the alcoholic drinks to McIntosh at the party. The statute provided it was a misdemeanor for a liquor licensee to "sell, vend, give away or otherwise supply any intoxicating liquor in any quantity whatsoever to . . . any person intoxicated or appearing to be in a state of intoxication . . . ." Section 311.310 RSMo 1978.[1] The McClures claim Jefferson Arms had a common law duty or a duty because of this statute not to furnish alcoholic beverages to McIntosh.

The common law in Missouri after 1981, but prior to enactment of §537.053 RSMo 1986,[2] held a tavern owner may be liable for serving alcoholic beverages to an intoxicated person or to a minor who subsequently struck and killed another. *See, Carver v. Schafer,* 647 S.W.2d 570, 572-75 (Mo. App. 1983); *Nesbitt v. Westport Square, Ltd.,* 624 S.W.2d 519, 520 (Mo. App. 1981); *Sampson v. W.F. Enterprises, Inc.,* 611 S.W.2d 333, 335-37 (Mo. App. 1981). However, liability for injuries caused by intoxicated drivers was never extended to social hosts. *See, e.g., Childress v. Sams,* 736 S.W.2d 48, 49-50 (Mo. banc 1987); *Andres v. Alpha Kappa Lambda Fraternity,* 730 S.W.2d

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[1] This was a criminal statute from which civil liability was derived. *See, Carver v. Schafer,* 647 S.W.2d 570, 575 (Mo. App. 1983). At the time of Richard McClure's death Missouri had no dram shop statute.

[2] This statute prohibits dram shop liability in Missouri except for "any person licensed to sell intoxicating liquor by the drink for consumption on the premises who, pursuant to section 311.310, RSMo, has been convicted, or has received a suspended imposition of the sentence arising from the conviction, of the sale of intoxicating liquor to a person under the age of twenty-one years or an obviously intoxicated person . . . ." Section 537.053.3 RSMo 1986. The Supreme Court of Missouri upheld the constitutionality of the statute in *Simpson v. Kilcher,* 749 S.W.2d 386 (Mo. banc 1988). Section 537.053, however, is inapplicable to this case. The statute became effective September 28, 1985, and the Supreme Court of Missouri has held the statute may not be applied retroactively. *Andres v. Alpha Kappa Lambda Fraternity,* 730 S.W.2d 547, 552-53 (Mo. banc 1987).

547, 553 (Mo. banc 1987) (relying on *Harriman v. Smith,* 697 S.W.2d 219 (Mo. App. 1985)).

In both *Childress,* 735 S.W.2d 48, and *Andres,* 730 S.W.2d 547, the injuries occurred prior to the enactment of §537.053 RSMo 1986. The Supreme Court refused to extend common law liability for injuries caused by intoxicated persons to social hosts. Here, Jefferson Arms did not sell alcoholic drinks to its employees and was, at most, a social host. Jefferson Arms had no intent to profit from the party. It derived no financial benefit from the party, and had no incentive to encourage employees to drink excessively. Jefferson Arms sponsored a party to reward its employees for completing an extensive and costly maintenance job. No commerical motive is evident. McIntosh attended the party voluntarily and not in the course of his employment duties. Even though Jefferson Arms is licensed to sell alcoholic beverages, it provided free drinks for its employees at the party. The beverages were furnished by a social host not a dram shop keeper.

Public policy in Missouri is that it is the consumption and not the furnishing of alcoholic beverages that is the proximate cause of injuries inflicted by intoxicated persons. Section 573.053.1 RSMo 1986. *See also, Spotts v. City of Kansas City,* 728 S.W.2d 242, 249-50 (Mo. App. 1987). The Supreme Court of Missouri in *Andres,* 730 S.W.2d at 553, adopted the reasoning of *Harriman v. Smith,* 697 S.W.2d 219 (Mo. App. 1985), and found that imposing liability upon social hosts would have a substantial impact upon everyday family and social affairs. *Andres,* 730 S.W.2d at 553. In *Childress,* 736 S.W.2d at 49-50, the court found that charging a minimal fee for drinks, but not a fee motivated by intent to generate a profit, did not destroy defendant's role as a social host and therefore did not create liability. *Id.*

We have found no Missouri cases contemplating liabililty of an employer for acts of an employee who becomes intoxicated

at a company sponsored party. However, several other states which, like Missouri, have no social host liability, have held there is no cause of action against employers for casualties involving employees leaving company sponsored parties. *See, e.g., Thompson v. Trickle,* 449 N.E.2d 910, 911-12 (Ill. App. Ct. 1983); *Kuykendall v. Top Notch Laminates, Inc.,* 520 A.2d 1115, 1117-18 (Md. Ct. Spec. App. 1987); *Whittaker v. Jet-Way, Inc.,* 394 N.W.2d 111, 113-14 (Mich. Ct. App. 1986); *Meany v. Newell,* 367 N.W.2d 472, 474-75 (Minn. 1985). *See also, Williams v. United States Fidelity and Guaranty Co.,* 854 F.2d 106, 108-09 (5th Cir. 1988) (applying Mississippi law).

We find Jefferson Arms was, at most, a social host and the trial court properly granted judgment notwithstanding the verdict on the theory of dram shop liability. The trial court ruled that no common law dram shop liability existed at the time of Richard McClure's death and, therefore, Jefferson Arms was not liable for his death. The court relied on *Spotts v. City of Kansas City,* 728 S.W.2d 242 (Mo. App. 1987), which held that dram shop liability established in *Carver v. Schafer,* 647 S.W.2d (Mo. App. 1983), would not be give retrospective effect. The trial court did not comment on the holdings in *Nesbitt v. Westport Square, Ltd.,* 624 S.W.2d 519 (Mo. App. 1981), or *Sampson v. W.F. Enterprises, Inc.,* 611 S.W.2d 333 (Mo. App. 1981), which were decided prior to the date of Richard McClure's death. We find that irrespective of the holdings in these cases, which dealt with liability of dram shops, Jefferson Arms did not sell alcoholic beverages to McIntosh for profit. As a social host Jefferson Arms was not liable for Richard McClure's death. We affirm an order for judgment notwithstanding the verdict if the ruling was proper for any reason, even if the grounds assigned were wrong. *Arthur v. Jablonow,* 665 S.W.2d 364, 365 (Mo. App. 1984). Point denied.

The second claim relates to plaintiffs' agency theory. It asserts the trial court erred in excluding the testimony of decedent's brother, William McClure. The McClures offered the

testimony of William McClure regarding statements made to him after the fact by Susan Moffit, building manager of Jefferson Arms at the time of the casualty. The court prohibited this testimony after finding the McClures had not disclosed the witness, thus violating a discovery request for statements made by any agent or employee of Jefferson Arms. The court acted within its discretion in excluding the testimony.

William McClure went to Jefferson Arms after Richard McClure was killed in an attempt to determine what had happened to his brother. He testified that when he went to Jefferson Arms and asked to speak with McIntosh, "[a] lady came out to me and said that he [McIntosh] wasn't available, that she could help me and her name was Mickey [the building manager]." He testified he then asked her if she knew what happened the night his brother died. Counsel for Jefferson Arms objected at this point, stating that Jefferson Arms submitted interrogatories to the McClures requesting any statements made by any agents or employees of Jefferson Arms about the incident, and that the McClures had denied having any such statements. Counsel for the McClures informed the court that if allowed to testify, William McClure would state the building manager told him: (1) the hotel had a party for its employees; (2) McIntosh got drunk at the party; (3) McIntosh was on duty the evening of the party; and, (4) she asked McIntosh to take Joy Pennebaker, another hotel employee, home from the party. The court found the McClures violated the discovery request and excluded testimony regarding what the building manager may have said to William McClure.

The interrogatory submitted to the McClures read:

> "State whether *you or anyone on your behalf* obtained a statement from any agent or employee of defendant Jefferson Arms Corporation concerning said occurrence and, if so:
>
> A. State the name and address of the person who obtained the statement;

B. State whether such statement was oral, written or recorded.

C. If written or recorded, attach a copy of said statement; if oral, state verbatim the contents thereof." (Our emphasis).

The answer given under oath was, "[n]one."

The McClures contend their son, William McClure, was not acting on their behalf when he questioned the building manager and therefore they were not obligated to include Moffitt's statements when answering the interrogatory. We find the scope of the interrogatory included the statements made by Moffitt to William McClure. The McClures did obtain such statement. The interrogatory was directed to identifying a witness, if any, known to plaintiffs with knowledge of such statements. It is knowledge, not agency, which is operative in the discovery process.

The claim also fails on the agency premise. In *Hilmer v. Hezel,* 492 S.W.2d 395 (Mo. App. 1973) this court addressed the issue of who may qualify as acting "on behalf of" a party when interrogatories are so phrased. In *Hilmer,* the pertinent interrogatory asked, "[d]id the defendant *or anyone on his behalf* obtain a written statement or recording from plaintiff concerning the facts of the occurrence in question?" (Our emphasis). *Id.* at 396. Although an insurer of the defendant had obtained such a statement, defendant replied, "[n]o" to the interrogatory. Defendant claimed the insurer had not acted on his behalf in obtaining the statement.

The *Hilmer* court stated that straining to determine who acted on behalf of the defendant "is an attempt at gamesmanship, contrary to the principle that the purpose of our rules of discovery is to minimize concealment and surprise in litigation." *Id.* at 396. The court found the defendant's insurer fell within the scope of those "acting on behalf" of defendant and exclud-

ed testimony of the insurer since the statements made to the insurer were not answered in the interrogatory.

Here, although William McClure was not a party to the suit, the statements he obtained and conveyed to plaintiffs fell within the scope of the interrogatory. To act on "behalf" of someone is to act for their benefit, support, defense or advantage. BLACK'S LAW DICTIONARY 141 (rev. 5th ed. 1979). William McClure acted for the benefit of his parents. The McClures attempted to use the statements made by Moffitt as evidence of respondeat superior liability of Jefferson Arms. The purpose of the interrogatory was for Jefferson Arms to find out if the McClures were aware of any statements made regarding Richard McClure's death by employees or agents of Jefferson Arms which supported a claim of respondeat superior liability. The McClures withheld their knowledge of a witness who was prepared to testify about statements of the building manager pertaining to whether McIntosh was on duty and acting within the scope of employment by Jefferson Arms at the time of the casualty. These are essential elements of the case and the statements were beneficial to the McClures in establishing liability of Jefferson Arms. Exclusion of this testimony did not preclude the McClures from attempting to establish liability through other evidence.

Whether a party is prejudiced by evasive answers to interrogatories so that exclusion of testimony is proper is a matter left to the discretion of the trial court. *Missouri Highway and Transportation Commission v. Pully*, 737 S.W.2d 241, 245-46 (Mo. App. 1987); *State Highway Commission of Missouri v. Cool's Tall Tower Restaurant and Marina, Inc.*, 654 S.W.2d 224, 226 (Mo. App. 1983). We cannot say the trial court abused its discretion in excluding the testimony.

The last issue is whether there was sufficient evidence to submit a claim of respondeat superior liability, particularly, whether the trial court erred in granting a directed verdict on

this theory. We find there was no evidence to support an agency claim and the court properly granted a directed verdict on the issue.

The McClures only argument in support of the claim of respondeat superior liability is that some states have imposed liability on employers for injuries to third persons caused by an intoxicated employee. No Missouri cases are cited in support of the claim of respondeat superior liability. As discussed earlier, although some states have imposed liability upon employers several other states which, like Missouri, have rejected social host liability, have refused to recognize liability of employers for injuries caused by employees who become intoxicated at employer parties. *See, e.g., Thompson v. Trickle,* 449 N.E.2d 910, 911-12 (Ill. App. Ct. 1983); *Kuykendall v. Top Notch Laminates, Inc.,* 520 A.2d 1115, 1117-18 (Md. Ct. Spec. App. 1987); *Whittaker v. Jet-Way, Inc.,* 394 N.W.2d 111, 113-14 (Mich. Ct. App. 1986); *Meany v. Newell,* 367 N.W.2d 472, 474-75 (Minn. 1985). *See also, Williams v. United States Fidelity and Guaranty Co.,* 854 F.2d 106, 108-09 (5th Cir. 1988). Because Jefferson Arms acted only as a social host of the party it is not subject to liability.

In addition, the evidence does not support a claim of respondeat superior liability. Susan Moffitt, the building manager, testified McIntosh's job did not require him to be on 24 hour call at Jefferson Arms and he was not on duty the night of the casualty. When asked if she instructed McIntosh to take Pennebaker home from the party, she replied, "[a]bsolutely not." There was no evidence McIntosh was acting within the scope of his employment when he drove Pennebaker home and his car struck Richard McClure. Pennebaker, a witness for Jefferson Arms, indicated McIntosh drove him home as a gesture of friendship and not out of McIntosh's employment duties at Jefferson Arms.

Pennebaker testified it was McIntosh who offered to take him home after the party. Pennebaker stated he and McIntosh left

the party at Jefferson Arms sometime before 11:30 p.m. and went to a nearby bar. Pennebaker testified he and McIntosh drank "two, possibly[y] three" more drinks at the bar. He stated that while they were at the bar, he told McIntosh he had to leave to catch a bus home, and that McIntosh then offered to give him a ride home. When asked if that was the first time that night the subject of McIntosh taking Pennebaker home came up, Pennebaker stated, "[t]hat was the first." McIntosh testified, but declined to answer any questions on constitutional grounds.

An employer may be found vicariously liable for an employee's tort if the employee commits such act while engaged in an activity falling within the scope of employment. *Maryland Casualty Co. v. Huger,* 728 S.W.2d 574, 579 (Mo. App. 1987). An act is considered within the scope of employment if it is: (1) something fairly and naturally incident to business, and, (2) done while engaged in the employer's business. *Id.*

When McIntosh drove Pennebaker to Pennebaker's home in Illinois, he was not acting within the scope of his employment. He was not on duty or engaged in any business for Jefferson Arms. McIntosh was not required to attend the party. He agreed to give a co-worker a ride home after a party and there is nothing in the record, except for the precluded testimony of William McClure, which indicates the building manager suggested McIntosh drive Pennebaker home. There is no evidence McIntosh acted within the scope of his employment as a maintenance worker when he drove Pennebaker home. Point denied.

We affirm.

/s/ Kent E. Karohl
Kent E. Karohl, Judge

Stanley A. Grimm, P.J., & Gary M. Gaertner, J., concur.

APPENDIX B

INSTRUCTION NO. 7

Your verdict must be for Plaintiffs Billy McClure and Effie McClure against Defendant Jefferson Arms if you believe:

First, Plaintiffs Billy McClure and Effie McClure were the natural father and mother of Richard McClure, and

Second, Defendant Jefferson Arms was licensed to sell or supply intoxicating liquor, and

Third, Defendant Jefferson Arms knew or by using ordinary care should have known that Defendant Wilbert McIntosh was intoxicated, and

Fourth, Defendant Jefferson Arms continued to supply intoxicating liquor consumed by Defendant Wilbert McIntosh, and

Fifth, Defendant Jefferson Arms was thereby negligent, and

Sixth, such negligence either directly caused or directly contributed to cause the death of Richard McClure.

The term "negligent" or "negligence" as used in this instruction means the failure to use ordinary care. The phrase "ordinary care" means that degree of care that an ordinarily careful and prudent person would use under the same or similar circumstances.

M.A.I. 20.01, 19.01 Modified, 11.07
Not in M.A.I.
Carver v. Schafer, 647 S.W.2d 570 (Mo. App. 1983)

Offered by Plaintiffs

/s/ Floyd McBride
Judge

APPENDIX C

Section 537.053, R.S.Mo. 1986

1. Since the repeal of the Missouri Dram Shop Act in 1934 (Laws of 1933-34, extra session, page 77), it has been and continues to be the policy of this state to follow the common law of England, as declared in Section 1.010, R.S.Mo., to prohibit dram shop liability and to follow the common law rule that furnishing alcoholic beverages is not the proximate cause of injuries inflicted by intoxicated persons.

2. The legislature hereby declares that this section shall be interpreted so that the holdings in cases such as *Carver v. Schafer,* 647 SW2d 570 (Mo.App. 1983); *Sampson v. W.F. Enterprises, Inc.,* 611 SW2d 333 (Mo.App. 1980); and *Nesbitt v. Westport Square, Ltd.,* 624 SW2d 519 (Mo.App. 1981) be abrogated in favor of prior judicial interpretation finding the consumption of alcoholic beverages, rather than the furnishing of alcoholic beverages to be the proximate cause of injuries inflicted upon another by an intoxicated person.

3. Notwithstanding subsections 1 and 2 of this section, a cause of action may be brought by or on behalf of any person who has suffered personal injury or death against any person licensed to sell intoxicating liquor by the drink for consumption on the premises who, pursuant to Section 311.310 R.S.Mo. has been convicted, or has received a suspended imposition of the sentence arising from the conviction, of the sale of intoxicating liquor to a person under the age of twenty-one years or an obviously intoxicated person if the sale of such intoxicating liquor is a proximate cause of the personal injury or death sustained by such person.